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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

VICTOR RUIZ-SOTO,

Defendant - Appellant.

No. 04-10235

D.C. No. CR-03-00318-KJD

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Kent J. Dawson, District Judge, Presiding

Submitted December 5, 2005^{**}

Before: GOODWIN, W. FLETCHER and FISHER, Circuit Judges.

Victor Ruiz-Soto appeals his 46-month sentence following his guilty plea to illegal re-entry into the United States following deportation in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Ruiz-Soto contends that the district court erred by denying his request for a downward departure in sentence. He was sentenced before the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). Although the discretionary denial of a downward departure under the pre-*Booker* mandatory Sentencing Guidelines is unreviewable, *see United States v. Linn*, 362 F.3d 1261, 1262 (9th Cir. 2004) (per curiam), we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. Accordingly, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline's* limited remand procedure to cases involving non-constitutional *Booker* error).

REMANDED.